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# MAKING A PRIMA FACIE CASE IN DEPENDENCY CLAIMS OF ERROR

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# *SOME PRACTICAL ADVICE ON HOW TO SELECT ISSUES AND MAKE A PRIMA FACIE CASE FOR RELIEF IN AN OPENING BRIEF*

*By: Dallas Sacher (2014)*

***(With Annotations Applying this Advice to Dependency Appeals)***

***By: Patrick McKenna (2019)***

## Annotated Introduction

**I began working at SDAP in June of 2012. Prior to this time, I had minimal appellate experience and was assigned my own caseload of criminal cases. During my first few years at SDAP, our Executive Director, Dallas Sacher, provided me with a wealth of advice about how to more persuasively structure my arguments. To this day, much of that advice has been incorporated into my own philosophy on brief writing.**

**In 2014 – the same year, incidentally, that I began to handle dependency cases – Dallas wrote "Some Practical Advice on How to Select Issues and Make a Prima Facie Case for Relief in An Opening Brief" for SDAP's annual seminar. Much of the advice he had previously provided me was concisely distilled in this article, which I view as one of the most useful guides on drafting an opening brief. I routinely re-read it and refer to it to this day.**

**Dallas's original article was specifically tailored to criminal appeals, even though much of its advice is equally applicable to dependency cases. In this article, I have sought to more concretely apply Dallas's advice to dependency appeals. I have kept Dallas's original article completely intact, adding in my own annotations – written in bold text – when I have an additional observation or comment about applying this advice in the dependency context.**

**Occasionally, I posit a different view than Dallas on certain topics. In so doing, I do not hope to confuse the reader, but merely underscore an important point: I believe that there are objectively right and wrong things we can do as appellate practitioners. I also believe that structuring a persuasive argument is as much art as science. What may work in one case (or for one attorney) may not work for the next.**

**For the relatively new practitioner, this article will hopefully serve as an important resource in crafting opening briefs. For experienced practitioners, much of the advice contained here may seem straightforward. Nonetheless, in reviewing hundreds of briefs over the past few years, I can assure you that we do not follow Dallas's advice as closely as we could. Even when I review my own briefing, I routinely find areas where my advocacy could have been strengthened by following Dallas's advice.**

**I hope that the information contained here is as helpful to you as it has been to me.**

**-Patrick McKenna**

# SOME PRACTICAL ADVICE ON HOW TO SELECT ISSUES AND MAKE A PRIMA FACIE CASE FOR RELIEF IN AN OPENING BRIEF

By: Dallas Sacher 2014

## (WITH ANNOTATIONS APPLYING THIS ADVICE TO DEPENDENCY APPEALS)

**By: Patrick McKenna 2019**

## INTRODUCTION

The moral relativists among us argue that truth is a variable commodity and that no one can really know what is ultimately right or wrong. While this position might be plausibly maintained in the realm of politics and philosophy, it is inconsistent with the realities of criminal appellate practice. There are certain truths that apply to the practice of law. The goal of this article is to reveal several of those truths so that the reader will be prepared to write an effective appellant's opening brief.

Although many of us became criminal defense lawyers because we held antisocial tendencies regarding the established order, the essential fact of appellate practice is that there are norms which cannot be escaped. The central norm is that you cannot obtain a remedy for your client without stating a prima facie case for relief in your opening brief. While you may wish to demonstrate your personal flair and erudition, you will fail your client if your brief does not follow a basic structure. As we have all learned through life experience, we

are forever compelled to subjugate our personal freedom for the greater good of society or, in this instance, our clients.

In my role as an assisting attorney at SDAP, I have encountered many young and enthusiastic lawyers who were hell-bent on grabbing the court's attention by using innovative structure and tactics in their opening briefs. It is always difficult to dash someone's creativity. However, the truth is that innovative structure will lead to only one result: the staff attorneys and justices at the Court of Appeal will be annoyed. As professionals, we are expected to use a certain structure and to employ a set citational form. The failure to do so will only harm the client.

Our primary task is to select the issues that the court must decide. In some cases, there are many possible issues that might be raised. In other cases, there is a paucity of potential claims. I will endeavor to deliver some guidelines as to how we should go about selecting the issues to be raised.

Finally, a prima facie case for relief can never be made without a showing of prejudice. I will catalogue a number of time tested methods for persuading the court that the defendant did not receive a fair trial.

## I.

## A BRIEF WORD ABOUT BREVITY.

If you are a faithful attendee of SDAP's seminars, you will recall a prior presentation on the virtue of brevity in an opening brief. (Sacher, Some Thoughts On Persuasive Brief Writing (2010), pp. 2-7, available from SDAP.) The full contents of that presentation will not be repeated here. However, the conscientious appellate lawyer would do well by striving to be succinct in an opening brief. The reason for this approach is simple: a short brief has a better chance of persuading the court than a long one.

A short brief is superior to a long brief since it suits the needs of the court. Like all busy professionals, justices and research attorneys only have so many hours in a work day. By providing a short brief, counsel assists the court in a profound way.

Conversely, a long brief is viewed as an annoyance. No one wants to read such a brief since it is time consuming to digest a lengthy legal document. The reader will be unhappy. A displeased reader will be disinclined to look favorably on the author's case.

There is no polite way to state the truth. If you have a practice of writing long briefs (i.e. over 50 pages in a routine jury trial case), you are disserving your clients. While you may believe that you are filing detailed and

thorough briefs, the reality is that the reader believes that the briefs are cumbersome and tedious.

A persuasive opening brief is one where irrelevant material has been avoided. Specific techniques for achieving this result can be found in our prior article. (Some Thoughts on Persuasive Brief Writing, supra, pp. 3-7.)

**Annotation #1: While Dallas's advice on brevity is completely true, I routinely find myself writing arguments and briefs that are longer than they need to be. There are several things we can all do to curb this problem, some of which will be explained more below. Two things bear emphasis here.**

**First, as we all know, dependency appeals often present a limited range of issues, particularly when the appeal follows the termination of parental rights. Compared to criminal law, we have a much more rigid statutory scheme and less friendly case law interpreting it. As such, many dependency appeals raise the same types of claims – violations of ICWA notice requirements, improper denials of petitions brought pursuant to Welfare and Institutions Code section 388, and erroneous rulings on the exceptions to adoption. If you are raising a claim like this, your argument about the governing legal principles can be summed up in a paragraph or two. Because the reader is well aware of these things, he or she will**

**inevitably be annoyed if it takes too long for the brief to directly address the case at hand. Our clients are best served by focusing on the most analogous cases and applying our facts to those cases. Similarly, the court is well aware of the different standards of review. Only in rare cases will a discussion longer than a few sentences be necessary for counsel to summarize the standard. However, counsel should be diligent in *applying* the standard to the particular case.**

**Second, a Statement of the Case and Facts should be tailored to the claims we are raising. (Note: I am well aware that other districts prefer counsel to include separate statements of the case and facts. In the Sixth District, the court prefers that counsel employ an integrated approach.) No matter the stage of the proceedings, the court will need to know certain things: the initial allegations, and the most pertinent court orders and rulings as the case moved through the system. Beyond these things, counsel should be judicious about what else he or she includes in the statement. If the only appellate claim is an ICWA violation, for example, then the court does not need counsel to provide a thorough recitation of the social worker's reports at each stage of the proceedings. Similarly, if the only issue on appeal is the application of an exception to adoptability, then counsel can – and should – focus on those facts from the social**

**worker's reports that directly relate to these claims.**

**When appropriate, counsel may also want to thematically frame portions of their statement. For example, if counsel is arguing the beneficial relationship exception on appeal, he or she will need to show regular visitation by the parent. In this circumstance, counsel should contemplate include a subheading in the statement where all pertinent information about the parent's visitation throughout the case is presented.**

**By drafting the statements with the arguments in mind, counsel will better serve the needs of the court and his or her client.**

II.

THERE IS NO EXCUSE FOR POOR CITATIONAL FORM.

The goal of an opening brief is to persuade the court that the client is entitled to a remedy. One way to harm the client's interests is to use improper citational form in citing to precedent or the record. It is a simple fact of life that the staff attorneys and justices at the Court of Appeal will take a dim view of a lawyer who cannot satisfy the most basic element of professionalism by using proper form.

In California, it is permissible to use either the form found in the California Style Manual or the Bluebook. (California Rules of Court, rule 1.200.) However, as a matter of practice, all of the California appellate courts

use the Style Manual in preparing their opinions. For this reason, counsel is well advised to use the Style Manual as well.

If you have any doubt about the proper form for citing to cases or other sources, it is easy to check your work. All you need to do is examine a recently filed opinion from the Court of Appeal or Supreme Court. If your form matches that found in the opinion, you are on safe ground.

With regard to record citations, you must cite "to the volume and page number" of the applicable transcript. (California Rules of Court, rule 8.204(a)(1)(C).) If a volume is part of an augmented record, the form is "ACT" or "ART." If you have any question about the proper form, you should consult an appellate project for assistance.

**Annotation #2: Again, I agree completely with this advice. As someone who reads a lot of briefs, incorrect citational form sticks out like a sore thumb. Often, it is the first thing my eye will notice on a given page. While a client is unlikely to lose an appeal due to bad citations, having too many citation problems can adversely affect the credibility of counsel and the claim being raised. A digital copy of the style manual can be located on the SDAP homepage (www.sdap.org).**

**The same advice also holds true for typos and formatting. As with citations, counsel is unlikely to lose a case due to typos or goofy**

**formatting. If the typos become too frequent – or the formatting is too informal – then these things can – and do – lower counsel's credibility as to more important things – i.e., the merits of the arguments.**

**Similarly, good citations, editing, and formatting are unlikely to win a case for counsel. As with good persuasive writing in general, counsel's goal should be to avoid anything that distracts from a clear presentation of the argument.**

## III.

## THE SELECTION OF ISSUES IS BEST GOVERNED BY YOUR USE OF FUNDAMENTAL COMMON SENSE.

In prior seminars, we have endeavored to provide guidance on methods for both spotting issues and determining whether they are arguable. (Robinson, Separating Wheat (or Gruel) From Chaff or How to Tell an Arguable Issue From a Frivolous One (2011); Sacher and Robinson, The Gestalt and the Specific: How to Spot Issues on Appeal (2004). For present purposes, my focus is much more narrow. The question is how counsel should go about selecting issues from the universe of *arguable* claims. I believe that there are a few common sense notions that can be used in performing this task.

As a starting point, appellate lawyers frequently debate the wisdom of raising more than two or three issues in a case. Those who argue for a limited number of issues find powerful support in the traditional view of Justice

Jackson that a multitude of issues will cause an appellate justice to conclude that your appeal is weaker than it is. (*Jones v. Barnes* (1983) 463 U.S. 745, 752.) I am not persuaded by this view.

My experience tells me that it is not the number of issues that serves to distract the reader. Rather, it is the unduly lengthy and redundant brief that harms the client's case. If a lawyer is capable of writing clear and succinct arguments, the reader will not become bored. I have perused any number of lengthy briefs that held my attention due to the author's superior analytical and writing skill.

Sometimes, counsel will have the good fortune to have five or six strong issues. In such a case, counsel does a disservice to the client by abandoning an argument that has a plausible chance of success. After all, it is the lawyer's duty to advocate and the court's duty to decide. A lawyer should not change roles and adjudicate an argument in place of the court. If the issue is a good one, the court should be the one to pass judgment.

Experience is the best teacher. I have seen a murder conviction reversed on the basis of the sixth issue raised in the opening brief. Since all six of the issues were perfectly valid, counsel performed ably by allowing the court to consider all six.

In determining whether to advance an issue, the primary criterion is

whether a plausible claim of prejudice can be made. As we know, showing error is the easy part. Establishing prejudice is often difficult. If you cannot show prejudice, there is no point in raising an issue. If you raise an error that truly had no impact on the result, you will only lose credibility with the court.

However, as is almost always true in the practice of law, there is an exception to this rule. Occasionally, there is a tactical benefit to raising an arguable, but ultimately losing, issue. The best example relates to insufficiency of the evidence claims.

A claim of insufficiency of the evidence is difficult to win since the standard of review tilts strongly in favor of the judgment. However, if the People's case was weak in certain respects, a challenge to the sufficiency of the evidence will educate the reader to believe that the trial was far from open and shut. This type of education may well tip the reader towards the conclusion that other arguments require reversal since the case was a close one.

A second consideration in selecting issues is whether you can connect a series of points that support a theme. While the ultimate theme is that the defendant did not receive a fair trial, there are a large universe of case specific themes. An example of a good theme is as follows.

I once had a case where the client was convicted of murdering his 84

year old adoptive mother on the theory that he persuaded her to desist from taking her prescribed medications. The hole in the People's case was that their own medical expert was unable to posit a cause of death. Thus, the lead issue was that there was insufficient evidence to prove that the actus reus (i.e. the client's advice to his mother) was the proximate cause of death. Significantly, I was able to pair this argument with a claim of ineffective assistance of counsel since the trial attorney had failed to call an expert witness who would have testified that the mother's physical condition was such that she could have died from four or five causes which would not have been prevented by her medications. These two issues tied together in a very neat way and supported the theme that there was a substantial doubt as to whether the client had actually "killed" his mother.

In the usual case, your various issues will not be as closely related as they were in the foregoing example. Nonetheless, you can still have a theme. For example, if the trial court committed five separate evidentiary errors, your theme will be that the trial was a shambles since the People were allowed to introduce a mountain of unreliable and/or prejudicial evidence while the exculpatory evidence was excluded. Or, in a case involving multiple instructional errors, the theme may be that the jury was hopelessly confused.

It is important to note that not every case has a theme. Sometimes, a

case will present several good issues which involve entirely separate areas of the law. In such a case, you do not want to lose credibility by manufacturing a less than credible theme.

As a corollary to your search for a theme, it is good practice to select issues that are compatible. If there is a claim that there is insufficient evidence regarding an element of the offense, it is very useful to pair the issue with a claim of instructional error regarding the element. Or, if the trial court overruled the defense objections to several types of prejudicial evidence (i.e. gang evidence, evidence of the defendant's drug use or prior acts of violence), a multi-part argument can be mounted that the defendant was denied a fair trial due to the cumulative weight of the inadmissible evidence.

As the foregoing techniques reveal, one's personal experience will inform the choice of issues. After handling a number of appeals, a lawyer will have a good idea of what "sells" to a court. If the court has a history of not purchasing certain issues, a lawyer is not doing a good job for the client by raising arguments that are either non-starters or have outlived their utility by being ritualistically raised and rejected. However, this is not to say that there are not issues which must necessarily be raised until they succeed.

A criminal appellate lawyer has an ethical duty to argue for change in the law if reasonable argument can be made in support of the change. (*People*

*v. Feggans* (1967) 67 Cal.2d 444, 447.) If you strongly believe that a higher court will eventually accept your view of what the law should be, the issue should be raised. If we fail to proceed in this manner, the law can never change for the better.

**Annotation #3: For the most part, I agree with Dallas's advice in the criminal context, though there are a few different considerations in dependency cases. Rare is the dependency case where there are truly more than three arguable issues. (I can use one hand to count the SDAP dependency appeals from the past five years where four or more issues have been raised.) Unlike in a criminal appeal – where, more or less, the entirety of the trial court proceedings can be reviewed – we are restricted, with some notable exceptions, to issues stemming directly from the most recent appealable order. Thus, Dallas's advice on not unnecessarily censoring arguable issues is not as applicable in the dependency context.**

**More often, dependency counsel is struggling to find a single arguable issue in order to prevent a *Phoenix H.* brief. Particularly in appeals from the termination of parental rights, counsel may not be left with much, if anything, to argue. Even so, I encourage counsel to think creatively about possible arguable issues. SDAP and the other appellate projects are always willing to talk through cases and think of different**

**ways to frame issues. While the dependency case law is uniformly terrible, we will have no ability to change it if we don't attempt to raise new claims in new ways when feasible.**

IV.

THE PRIMA FACIE CASE FOR RELIEF.

The elements of the prima facie case are: (1) a proper argument heading; (2) the material facts and procedural history underlying the claim; (3) the objection or offer of proof (or assertion that no objection or offer of proof was required) and ruling on the claim; (4) a precise statement of the legal basis for your claim; (5) the standard of review; (6) an exposition of the law establishing that error occurred; (7) a showing of prejudice; and (8) a statement of the remedy requested. Careful attention is required as to each of these elements.

Although it may seem too obvious to state, the initial component of the prima facie case is the heading for your argument. Pursuant to California Rules of Court, rule 8.204(a)(1)(B), it is incumbent upon counsel to state "each point under a separate heading or subheading summarizing the point...." If you fail to properly state your contention in a heading, the court may deem the claim to be forfeited. (*People v. Scott* (2009) 179 Cal.App.4th 920, 924 [argument forfeited where it was not developed under a heading].)

As a matter of good practice, counsel should assert any and all federal constitutional bases for the contention in the argument heading. This practice serves two purposes. First, if you have a federal claim, you will want to raise and exhaust it in state court so that your client can fight another day on federal habeas. In order to get to federal court, the client's federal claim must have been expressly raised in both the Court of Appeal and the California Supreme Court. (*Duncan v. Henry* (1995) 513 U.S. 364, 365-366 [federal relief unavailable where the Fourteenth Amendment was not mentioned in the defendant's state court pleadings].) Second, the practice of always including your federal claim in the argument heading will serve as a check against your inadvertent failure to preserve the client's federal claim. If you always federalize in the argument hearing, you will never fail to remember to federalize.

**Annotation #4: Dependency appeals typically implicate an individual's constitutional rights to a lesser degree than do criminal appeals. Even so, it does happen – most often in regards to a defendant's Sixth or Fourteenth Amendment rights (see, e.g., *Lassiter v. Department of Social Servs.* (1981) 452 U.S. 18, 33-34; *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1707). Other amendments may be implicated in other cases. In a recent SDAP case, for example, we challenged one of the**

**court's dispositional orders on First Amendment grounds. When a claim has a federal basis, counsel should ensure that the relevant constitutional amendment is cited in the header.**

**More broadly speaking, counsel should strive to write coherent headings and subheadings. A good rule of thumb is to review your table of contents prior to filing the brief. The headings should clearly state the alleged error, and the subheadings should indicate that all prima facie elements of the case are addressed.**

The recitation of the material facts and procedural history is the second component of the prima facie case. Facts are the lifeblood of any legal argument. An issue of law does not exist in an abstract vacuum. Rather, a legal issue can only be rationally analyzed in the context of the facts which gave rise to the issue. For this reason, counsel has a duty to fully and carefully recite the facts and procedural history which form the basis for the claim of error.

In stating the relevant facts and procedural history, counsel should not forget the guiding principle of brevity. The reader already has a global recitation of the evidence from the Statement of Facts section of the brief. The facts depicted at the beginning of a legal argument should be limited to those which bear on the issue at hand.

Of course, the nature and length of your factual and procedural recitation will vary depending upon the specific legal issue being advanced. A few examples follow.

Typically, Fourth Amendment claims are fact intensive. Stops and searches usually occur on the street and involve a chain of events. In order that the court may fully appreciate the various legal nuances attendant to our complicated Fourth Amendment jurisprudence, it is critical that a detailed factual account be given. This is necessarily so since the analysis usually involves discrete, sequential issues involving detentions, pat searches and the existence or non-existence of probable cause to justify a search or arrest. The court needs to know all of the facts in order to decide these various issues.

By comparison, some evidentiary issues require very little factual recitation. For example, the prosecutor will often produce evidence that the defendant possessed a weapon other than the one used in the commission of the crime. In setting up the claim that the court erred by allowing admission of the evidence, the factual recital need only be a two sentence summation showing that a police officer went to the defendant's house and found a .45 magnum, or a knife or whatever.

Similarly, many instructional claims require very little reference to the record. In a homicide case, the issue might be that the trial court erred by

failing to give an instruction on antecedent threats made to the defendant. (See CALCRIM 3470.) The relevant factual basis for the claim can be efficiently stated: on a prior occasion, the alleged victim threatened to kill the defendant. Nothing more is required.

As with all components of an opening brief, the guiding principle is that the recitation of the facts should be both authoritative and concise. Counsel should provide all of the necessary facts that support the claim of error. In so doing, redundancy should be avoided and collateral facts should be excised. Precision in the statement of the evidence will earn both the admiration and attention of the court.

**Annotation #5: Dallas's article fails to mention one critical point. Unless an argument is very short, I highly encourage counsel to include a brief introduction at the beginning of an argument. This should include a thesis statement. I have read many briefs where the precise nature of the claim is not apparent until the fourth or fifth page. The preceding discussion is almost worthless since the reader has no idea why certain facts or case law is relevant. This is particularly true when the heading itself is ambiguous.**

**In my own cases, I do not outline too much before I start on the brief. It is often difficult for me to think through an issue until I put**

**words on a piece of paper. As such, I almost always edit my thesis statements and introductions multiple times to better reflect what I am actually arguing. Upon completing his or her brief, I encourage counsel to take one final look at the thesis statements and introductions to ensure they are clear.**

**If my argument is pretty short – or not factually intensive – then I often will include the relevant procedural background as part of the introduction. If the claim is more complicated, then I include them under their own subheading. Counsel should ensure that this component of the argument is not merely redundant to the information included in the Statement of Case and Facts. As good advocates, one of our goals is to prevent the reader from working too hard. All the relevant information should be clearly presented to the court, including those facts that are unhelpful to us. Hiding the bad facts does not mean they do not exist. Counsel's credibility will be severely damaged by doing so.**

The third component of the prima facie case is a reference to the place in the record where defense counsel raised the legal issue at hand. You should state the exact nature of the objection or request. A page citation to the record is required in every instance. The failure to cite to the record will highly aggravate the personnel at the Court of Appeal.

Special attention is required with regard to evidentiary issues. By statute, a claim of error relating to the admission of evidence is barred on appeal absent a contemporaneous objection. (Evidence Code section 353.) Similarly, a claim involving the exclusion of evidence requires an offer of proof unless the evidence was offered during cross-examination. (Evidence Code section 354.) Most importantly, the Supreme Court has said that an appellate court has no authority to excuse defaults under sections 353 and 354. (*People v. Williams* (1998) 17 Cal.4th 148, 162, fn. 6.) It is therefore incumbent upon counsel to carefully establish that a sufficient objection or offer of proof was made.

For the most part, a legal claim must first be advanced in the trial court in order to be cognizable on appeal. This is true of the oft raised claims of prosecutorial misconduct and sentencing error. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Scott* (1994) 9 Cal.4th 331, 336.) As is the case with evidentiary error, care must be taken to carefully state the exact objection or argument made in the trial court.

Of course, some issues can be raised on appeal without prior objection. Most instructional claims fall within this category. (Penal Code section 1259.) Claims of jurisdictional error involving the statute of limitations or "unauthorized" sentences can also be raised for the first time on appeal.

(*People v. Williams* (1999) 21 Cal.4th 335, 337-338; *People v. Scott*, supra, 9 Cal.4th 331, 354.) If you have an issue that falls within one of these categories, you will need to expressly cite the authority that establishes that an objection was not required to preserve the issue.

It is foolish to fudge about the sufficiency of the objection or offer of proof. Obfuscation will not work. The Attorney General is trained to dissect the sufficiency of the objection or offer of proof. If there is any doubt as to whether an adequate record was made below, you will need to add a backup claim of ineffective assistance of counsel. The claim has to be made under a separate heading or subheading and the prejudice test of *Strickland v. Washington* (1984) 466 U.S. 668 must be applied. (See California Rules of Court, rule 8.204(a)(1)(B) [each point in a brief must be stated "under a separate heading or subheading summarizing the point. . . ."]; *People v. Bryant* (2013) 222 Cal.App.4th 1196, 1206, fn. 11, ptn. for rv. pending [claim of ineffective assistance of counsel deemed forfeited where it was raised in a "single sentence . . . ."].)

**Annotation #6: If there is a credible argument that a claim was not adequately preserved, then counsel should address this in the opening brief. If there is a very strong argument in favor of forfeiture/waiver, then counsel should raise a back-up claim of ineffective assistance of**

**counsel in the opening brief and, if applicable, in a petition for writ of habeas corpus.**

**A few notes:**

**Submission on the social worker's report means only that trial counsel accepted the alleged facts as true. Appellate counsel is not barred from claiming that these facts are legally insufficient to support the juvenile court's findings. (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 565.) Submission on the social worker's recommendation, however, will likely waive review of that recommendation on appeal. (*See In re Richard K.* (1994) 3 Cal.4th 580.)**

**An objection is not required to preserve a claim that an order or finding is supported by sufficient evidence. (*In re Brian P.* (2002) 99 Cal.App.4th 616, 623.) This does not apply when raising an exception to adoption since the parent has the burden of proof in the trial court. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 403.) There is a split in authority about whether the legal sufficiency of the petition can be challenged when a demurrer was not brought below. (*Compare In re Nicholas B.* (2001) 88 Cal.App.4th 1126 with *In re Shelley J.* (1998) 68 Cal.App.4th 322.) Counsel should argue that the *Nicholas B.* line of cases are better reasoned and should be followed; a back-up claim of ineffective assistance of counsel may also be prudent.**

**Generally speaking, ICWA challenges do not require an objection below. This is true even when raised for the first time in an appeal from the termination from parental rights since a juvenile court has an ongoing duty of inquiry. (*In re Isaiah W.* (2016) 1 Cal.5th 1, 14.) Certain procedural rights may be waived if they are not asserted below. (*See, e.g., In re Jennifer A.* (2002) 103 Cal.App.4th 692, 707.)**

**Counsel may argue against forfeiture or waiver by claiming that there was no opportunity to object below (*People v. Bautista* (1998) 63 Cal.App.4th 865) or if a pure question of law is presented (*In re Jasmine C.* (1999) 70 Cal.App.4th 71). Moreover, an appellate court does have the inherent authority to excuse forfeiture, though this is most commonly employed only in rare cases. (*See In re S.B.* (2004) 32 Cal.4th 1287.)**

**For further advice on waiver/forfeiture, I recommend that counsel review Chapter 10 of the "California Juvenile Dependency Practice" Manual by Brad Bristow.**

The fourth component of the prima facie case is the statement of the legal basis for the claim. The legal basis must be stated with precision and accuracy in order to guarantee that the Court of Appeal will understand the claim and actually address it. As has been discussed above, it is particularly important that any federal constitutional issue be expressly raised by reference to the supporting constitutional provision. For example, if the issue involves

the trial court's curtailment of the cross-examination of a government witness, you should state your legal basis as "the trial court erred under the Confrontation Clause of the Sixth Amendment when it precluded proper cross-examination of witness X."

A viable legal argument can arise under a myriad of legal principles. The legal basis of an argument can be anything from the state or federal Constitutions to state statutes to arithmetical errors in the calculation of the length of the sentence or presentence credits. Regardless of what the legal basis may be, your duty is to state it clearly.

**Annotation #7: This is, more or less, the thesis statement I described above. I agree with all of Dallas's comments but encourage counsel to put the thesis earlier than Dallas's article may suggest.**

The fifth component of the prima facie case is the standard of review. This component is often the determinative factor in an appeal. The standard of review is the court's guidepost for deciding the case. If you fail to cite the standard, your credibility with the court will be shot. As with the objection requirement, you cannot fudge the standard of review. If the standard is unfavorable (e.g. abuse of discretion), you have to acknowledge the standard and do your best to show that it is satisfied.

Oftentimes, an appellate advocate will suffer a moment of despair or

loss of faith upon realizing that the standard is unfavorable. However, there are some helpful nuances in the law even though a standard of review is seemingly adverse to the defendant.

The real world meaning of the abuse of discretion standard is that the appellant loses unless the trial court did something really crazy. This is the standard for most sentencing claims. **(Annotation #8: And dependency claims for that matter!)** Stated in legal terms, it is appellant's burden to establish that the court's ruling was irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) Occasionally, a court's action will fit the bill.

For example, a court has discretion in making an award of victim restitution. (*People v. Garcia* (2011) 194 Cal.App.4th 612, 617.) But, the court "must employ a rational method" for calculating the amount of restitution. (*Ibid*.) When the method is faulty, a remedy can be obtained. (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 995-996 [court erred by awarding 13 months of lost value for rental of cement mixer since the victim acted unreasonably by waiting that long to replace the mixer].)

As the example reveals, the trick is to find a foothold in the case law where a specific circumstance has been found to be irrational or arbitrary. While such nuggets are rare with respect to routine sentencing issues such as the length of the term, careful research can sometimes yield helpful results.

A different take on the abuse of discretion standard can be found in the area of evidentiary error. The courts have said that a trial court's evidentiary rulings are subject to review for abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.) However, for the most part, this assertion is lip service since most evidentiary issues actually present pure questions of logic (i.e. issues of law). An example can be found in the precedent involving Evidence Code section 403.

Pursuant to section 403, the trial court acts as the gatekeeper in determining whether evidence has a sufficient foundation to go to the jury. Although the Supreme Court has said that a court is vested with discretion under section 403, trial judges are admonished to exclude evidence "only if the 'showing of preliminary facts is too weak to support a favorable determination by the jury.' [Citations.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 466.) By definition, the court will abuse its discretion under this test if it excludes evidence that has any plausible foundation. Presumably, appellants will frequently prevail on this issue regardless of the supposed abuse of discretion standard.

As a final point concerning the abuse of discretion standard, Presiding Justice Rushing has perceptively argued that the standard has been misapplied in situations where pure questions of law are at issue. (*Miyamoto v.*

*Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1222-1225 (conc. opn. of Rushing, P.J.).) In Presiding Justice Rushing's view, a court has no discretion to exercise when it is applying a rule of law to evidentiary questions based on undisputed facts. (*Ibid*.) In a proper case, this argument might be advanced for a client's benefit. (See also *People v. Tran* (2013) 215 Cal.App.4th 1207, 1217-1218 [Presiding Justice Rushing suggests that there are "gradations" to abuse of discretion review depending upon the legal principles at issue].)

**Annotation #9: As I noted above, do not spend your time reciting the standard of review; spend your time applying it. The main exception is when the standard of review is in dispute or if counsel seeks to argue that a pure issue of law is presented (thereby requiring de novo review [*People v. Cromer* (2001) 24 Cal.4th 889, 894]) and the abuse of discretion standard should not govern. In the latter circumstance, counsel should still argue why reversal is required under either standard.**

**When an order is challenged for insufficient evidence, a common mistake – I intuitively do this too – is to flip the standard of review on its head. Instead of showing why insufficient evidence supported the order, counsel often argues there was sufficient evidence to support a contrary finding in his or her client's favor. Counsel should use good facts in**

**support of the argument, but the focus should be on how all the "bad facts" were not legally sufficient. Counsel does his or her client a disservice by doing otherwise.**

**Most commonly, we are left with an abuse of discretion standard on appeal. This is not a unified standard, and the requisite deference depends on the aspect of a court's ruling being challenged; "the trial court's findings of facts are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." *(Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, fns. omitted.)**

**In practice, the standard can be met if counsel can affirmatively show that the trial court's ruling rested on a legal error or a misunderstanding of the facts. (*See, e.g., People v. Thimmes* (2006) 138 Cal.App.4th 1207, 1212-1213.) Similarly, counsel should prevail if the record clearly shows that the court misunderstood or was unaware of its discretion. (*See, e.g., In re Sean W.* (2005) 127 Cal.App.4th 1177, 1188-1189.)**

**In 2015, my colleagues Jonathan Grossman and Dallas Sacher wrote a lengthy article "Standards of Review and Prejudice and How to Satisfy Them." The article is focused on criminal appeals, but**

**dependency attorneys would be well-advised to read the article, as many of the tips are equally applicable to dependency cases. The article is available on the SDAP website.**

The sixth component of the prima facie case is the exposition of the law establishing that error occurred. In advancing the merits of an issue, it is important to first set forth the thesis of your argument. Once the thesis is stated, you can then discuss the relevant legal principles which support your position. In so doing, you should not forget our guiding principle: present your argument with brevity and precision. **(Annotation #10: Again, I encourage counsel to put the thesis statement higher than this article may suggest.)**

A common belief of young attorneys is that it is necessary to discuss each case precedent in detail with respect to both its facts and reasoning. This is simply untrue. The appellate court is interested in the bottom line. The resolution of your case will turn on whether the *holdings* in prior cases support your position. Unless there is a case specific reason to do so, you should cite cases solely for their holdings and those details that are relevant to your case.

The best technique for efficiently citing case law is to summarize the holding in a single sentence. For example, if the issue before the court involves the proper scope of a statute, you can synopsize a holding in the following manner: "(*People v. Hodges* (2009) 174 Cal.App.4th 1096, 1102, fn.

5 [Penal Code section 1237.1 requires the defendant to "raise the issue at sentencing, or, upon later discovery of miscalculation, by motion for correction of the record in the trial court. [Citation]."].) As the example shows, the reader has been quickly given the relevant principle stated in the case.

In preparing your legal analysis, you will be confronted with the tactical decision as to whether you should address the counter-arguments that might be made in opposition to your position. Although this decision has to be made on a case-by-case basis, there are two applicable rules of thumb.

First, if you have no doubt that the counter-arguments will be advanced by the People, they should be addressed. By raising the issues in the first instance, you will demonstrate to the court that you are a thorough, thoughtful and fair minded advocate. By fostering this reputation, you will help the present client and your future clients.

Second, counsel should be wary of the problem of arguing "uphill." If you are bright and well informed, you can always imagine more arguments against your position than will ever be presented by the People. In my experience, the Attorney General typically raises only the most obvious arguments and does not worry about more esoteric points. As a result, you should do the same. If a possible counter-argument is not obvious, you should not bring it to the Attorney General's attention.

In addition, you must be sensitive to the appearance that there are simply too many obstacles in front of you. I have read opening briefs where counsel addressed numerous possible counter-arguments. This type of briefing has usually left me with the feeling that we are going to lose since the road to victory is blocked by too many hurdles.

The most important portion of your prima facie case is the showing of prejudice. The drafting of this section of the brief requires careful attention.

While I have argued that brevity is a virtue, the discussion of prejudice is the one exception to the rule. We have all had the experience of reading an opening brief where thirty pages were devoted to the exposition of error and one page was given to the prejudice analysis. Unless the error is reversible per se, this single page has virtually no chance to persuade the reader.

In formulating your prejudice discussion, you must first set forth the applicable test. Most issues can be framed as federal constitutional error which implicates the standard of *Chapman v. California* (1967) 386 U.S. 18. If it is questionable that the *Chapman* test applies, you should also argue the state test of *People v. Watson* (1956) 46 Cal.2d 818. Since the tests are different in nature, it is vital that you separately apply them. This attention to detail will impress the reader.

In arguing the *Chapman* test, counsel should emphasize that it is the

People's burden to establish that the error was harmless beyond a reasonable doubt. (*Chapman*, supra, 386 U.S. at p. 24.) It should be affirmatively argued that the appellate court should not usurp the province of the jury by itself determining the guilt or innocence of the defendant. (*People v. Jackson* (2014) 58 Cal.4th 724, 790 (conc. and dis. opn. of Liu, J.).) Rather, reversal is compelled under *Chapman* unless the People can "show that the error *did not* have adverse effects." (*Id*. at p. 793.)

It is critical to note that case law has developed hybrid versions of the *Chapman* standard which are more favorable than *Chapman* itself. Primary examples of these hybrids include: (1) error in instructing on a mandatory presumption (*Yates v. Evatt* (1991) 500 U.S. 391, 404 [error is prejudicial unless the record shows that the jury's verdict "actually rested" on evidence unrelated to the presumption]; (2) error in instructing on an invalid theory of liability (*People v. Chun* (2009) 45 Cal.4th 1172, 1204-1205 [same as *Yates*]; (3) error in precluding the jury from seeing a testifying witness (*Coy v. Iowa* (1988) 487 U.S. 1012, 1021-1022 [witness' testimony must be disregarded]); (4) error in failing to instruct on an element of the offense (*Neder v. United States* (1999) 527 U.S. 1, 19 [error must be deemed prejudicial if "the defendant contested the omitted element and raised evidence sufficient to support a contrary finding . . . ."].) In a proper case, counsel should consider

whether either case law or logic allows for similarly stringent applications of *Chapman*.

Notwithstanding the official standards for prejudice, there is a "real world" test that is employed by the courts. Instead of applying the objective tests found in the case law, judges often prefer a subjective standard which I call: "The He's Good For It" test. Under this standard, a judge will only reverse the judgment based on the conclusion that there is a substantial possibility that the defendant is either not guilty or is guilty of less than what the jury found to be the case. Given this de facto test, it behooves counsel to skillfully advance a factual showing of either innocence or mitigated liability. This can be done by showing the factual weaknesses in the People's case such as suspect witnesses of poor character or evidentiary inconsistencies. Failing that, it is useful to carefully marshall facts demonstrating that the supposed victim was an evil individual for whom the judges should lack sympathy. (For further guidance on this approach, please see Sacher, How To Make A Winning Prejudice Argument: A Report On Persuasive Methods Used By Experienced Appellate Lawyers (2005), available from SDAP.)

Aside from a focus on the helpful facts in the record, there are a variety of tried and true methods for establishing prejudice. The record should be scoured to see if any of the following circumstances apply: (1) lengthy jury

deliberations (*People v. Cardenas* (1982) 31 Cal.3d 897, 907 [six hours of deliberation is evidence of a close case].); (2) a prior hung jury (*People v. Brooks* (1979) 88 Cal.App.3d 180, 188, disapproved on other grounds in *People v. Mendoza* (2011) 52 Cal.4th 1056, 1086); (3) acquittals on some counts (*People v. Brown* (1993) 17 Cal.App.4th 1389, 1398; *People v. Epps* (1981) 122 Cal.App.3d 691, 698; *People v. Washington* (1958) 163 Cal.App.2d 833, 846); (4) jury requests for additional instructions or readback of testimony (*People v. Filson* (1994) 22 Cal.App.4th 1841, 1852, overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40); (5) the prosecutor's comments to the court with regard to evidentiary issues (*Singh v. Prunty* (9th Cir. 1998) 142 F.3d 1157, 1163 [court reversed based on prosecutor's "candid concession" of importance of excluded evidence since "the prosecutor, more than neutral jurists, can better perceive the weakness of the state's case."].); (6) prosecutorial exploitation of the error during closing argument (*LeMons v. Regents of University of California* (1978) 21 Cal.2d 869, 876 [reliance on erroneous instruction]; *People v. Cruz* (1964) 61 Cal.2d 861, 868 [preponderant emphasis on inadmissible evidence]; *Chambers v. McDaniel* (9th Cir. 2008) 549 F.3d 1191, 1200 [prejudice found where prosecutor "emphasized" erroneous instruction

during closing argument].); (7) error which disproportionately impacted on the defense case (i.e. key defense witness was erroneously impeached (*People v. Rucker* (1980) 26 Cal.3d 368, 391; *People v. Wagner* (1975) 13 Cal.3d 612, 621); (8) error that precluded the defense from presenting its theory of the case (*People v. Spearman* (1979) 25 Cal.3d 107, 119; *People v. Filson*, supra, 22 Cal.App.4th 1841, 1852; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 740-741); (9) error which disproportionally helped the People's case (i.e. exclusion of impeaching evidence regarding the key government witness) (*People v. Randle* (1982) 130 Cal.App.3d 286, 293); (10) error that went to the central issue in the case (*People v. Vargas* (1973) 9 Cal.3d 470, 481 [*Griffin* error is prejudicial if it touches a "'live nerve'" in the defense].); and (11) anything else that might show prejudice.

In making your case specific argument for prejudice, it should not be overlooked that some errors are better than others. Errors in the admission of the defendant's confession or evidence that the defendant was a gang member or a drug addict are highly prejudicial regardless of the strength of the government's case. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296 ["'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him'"]; *People v. Cardenas,* supra, 31 Cal.3d 897, 904-907 [admission of gang evidence leads to " 'a substantial

danger of undue prejudice;' " admission of evidence of narcotics addiction is "`catastrophic.'"].) Appellate counsel should strive to find those case authorities which depict a particular error as being one which necessarily involves a high degree of prejudice.

In a proper case, a claim of cumulative prejudice should be made as the final argument. Even though each individual error might not amount to much on its own, a pattern of error can be used to depict a trial that skidded off the rails. (*People v. Hill*, supra, 17 Cal.4th 800, 845 ["sheer number of instances of prosecutorial misconduct and other legal errors" deprived the defendant of a fair trial].)

The goal of a cumulative prejudice argument is to show that the errors were interrelated and thereby caused the foundation of a fair trial to crumble. A useful model for showing cumulative prejudice is to compare the trial that actually occurred with the one that would have occurred absent the errors. (*Bonin v. Calderon* (9th Cir. 1995) 59 F.3d 815, 834 [in assessing prejudice, the court should "compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently."].)

In employing the comparative model, you should demonstrate that the People's case was artificially strengthened and the defendant's case was

unfairly diminished. By showing that the entire balance of the trial was skewed, you can persuade the court that a new (and fair) trial is required.

The final piece of the prima facie case is the statement of the requested remedy. In this section, you should concisely and precisely describe the relief that should be afforded. You should be sure to ask for the maximum relief possible. Generally speaking, the court will not give a greater remedy than the one sought. However, the court will often given a lesser form of relief.

If a range of remedies is possible, each potential resolution should be carefully described. In many cases, the court will only be willing to partially reduce a conviction. Thus, the suggested remedy might be to reverse a murder conviction with directions to allow the prosecutor an opportunity to accept a reduction to voluntary manslaughter. In a similar vein, the improper denial of a motion for new trial might lead to either a complete reversal or a reversal with directions to reconsider the motion. Although you will want to seek the broadest remedy possible, some remedy is usually better than no remedy.

It should not be forgotten that an appellate court has broad remedial authority. (Penal Code section 1260.) In the last section of your prima facie case, you should not be afraid to request an innovative or unusual remedy which will be in your client's best interests.

## CONCLUSION

The practice of appellate law is governed by a fairly strict set of norms. As genetic individualists, appellate lawyers often chafe against those norms and desire to express themselves in new and different ways. My experience has taught me that an effective appellate lawyer is one who has the discipline to conform to the prima facie structure that the courts expect. Since the highest calling of a lawyer is to serve the client with zeal, skill and knowledge, we should all conform to the norms that will best help the client.